EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

90-1289

No. _____

Supreme Court, U.S.
FILED
JAN 2 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ALLAN M. THOMANN, Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT APPELLATE COURT OF THE STATE OF ILLINOIS

Larry S. Mills

LAW OFFICES OF RICHARD J. DOYLE
& ASSOCIATES
1022 N. Vermilion St.
Danville, IL 61832
217-446-3844

Attorney for Petitioner

QUESTION PRESENTED

MAY THE STATE BASE A CHILD PORNOGRAPHY CONVICTION ON EVIDENCE WHICH IS NOT SHOWN TO TRULY AND ACCURATELY DEPICT CHILDREN ENGAGED IN SEXUAL CONDUCT?

TABLE OF CONTENTS

QUESTION PRESENTED 1

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

OPINION BELOW 4

JURISDICTION 5

CONSTITUTIONAL PROVISIONS INVOLVED . 6

STATUTES INVOLVED 7

STATEMENT OF THE CASE 9

REASONS FOR GRANTING THE WRIT 20

APPENDIX 29

TABLE OF AUTHORITIES

New York v. Ferber, 458 U.S. 747, 763, 102 S. Ct. 3348, 73 L.Ed. 1113 (1982) . . . . . 20 - 26

Bose v. Consumers Union of United States, Inc., 466 U.S. 485, 505, 104 S.Ct. 1949, 80 L.Ed. 2d 502 (1983) 27

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ALLAN M. THOMANN, Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT APPELLATE COURT OF THE STATE OF ILLINOIS

The Petitioner, ALLAN M. THOMANN, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Fourth District Court of Appeals for the State of Illinois, entered in the above-entitled proceeding on May 1, 1990.

OPINIONS BELOW

The opinion of the Fourth District Court of Appeals of the State of Illinois is recorded at 197 Ill. App. 3d 488, 544 N.E. 2d 748, 143 Ill. Dec. 813

(4th Dist. 1990), and is reprinted in the appendix hereto.

JURISDICTION

This Court's jurisdiction is evoked under 28 U.S.C. Sec. 1257, the Petitioner raising a claim under the United States Constitution in a criminal prosecution.

The petitioner was convicted and sentenced on one count of child pornography, this conviction and sentence being appealed to the Fourth District Appellate Court which issued an opinion denying the appeal on May 1, 1990. A Petition for Leave to Appeal to the Illinois Supreme Court was timely filed and was denied by that Court on October 3, 1990.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, 4th Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, 14th Amendment:

> ...; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Illinois Revised Statutes, Chapter 38, Section 11-20-1:

(a) A person commits the offense of child pornography who:

(1) . . . any child whom he knows or reasonably should know to be under the age of 18 where such child is:

(i) actually or by simulation engaged in any act of sexual intercourse with any person or animal; or

(ii) actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus, or sex organs of another person or animal; or which involves the mouth, anus or sex organs of the child and the sex organs of another person or animal; or

(iii) actually or by simulation engaged in any act of masturbation; or

(iv) actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal; or

(v) actually or by simulation engaged in any act of excretion or urination within a sexual context, or

(vi) actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context, or

(vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the genitals of the child or other person; or

(2) with the knowledge of the nature or content thereof, reproduces, disseminates, offers to disseminate, exhibits or possesses any film, videotape, photograph or other similar visual reproduction of any child whom the person knows or reasonably should know to be under the age of 18 engaged in any activity described in subparagraph (i) through (vii) of paragraph (1) of this subsection . . .

(c) . . . violation of paragraph (2) of subsection (a) is a class 4 felony with a mandatory minimum fine of $1,000.00 and a maximum fine of $25,000.00

STATEMENT OF THE CASE

The petitioner was charged by information with five counts of child pornography in Vermilion County, Illinois.

TRIAL

The case went to bench trial before the Honorable Thomas J. Fahey from June 12, 1989 through June 15, 1989.

At the close of all the evidence, there was no dispute that Allan Thomann had been in contact with Investigator Chris Hunt, that Allan Thomann had sent a certain videotape, People's #2A, to Chris Hunt. Allan Thomann also testified that he had sent certain letters entered into evidence to Chris Hunt. However, there was substantial dispute concerning any foundation laid for the admission of People's #2A, a videotape, and concerning Allan Thomann's knowledge of the contents

of People's #2A.

The evidence at trial established that Chris Hunt received a letter from Allan Thomann. The letter was written April 26, 1988. However, Hunt did not realize he had received the letter until he went to his post office box on July 8, 1988. (Volume IV, P. 12-13) Hunt wrote a response to that letter on July 11, 1988. (Volume IV, P. 17)

On July 18, 1988, Hunt received a second letter from Allan Thomann along with a videotape, later identified as People's Exhibit #2A (Volume IV, P. 17) In toto, Hunt sent four (4) letters to Allan Thomann and received three (3) letters and the videotape. (Volume IV, P. 80)

The only other contacts between Chris Hunt and Allan Thomann prior to the Search Warrant and Allan's Thomann's arrest were a phone call from Allan Thomann to Chris

Hunt's answering machine, a phone call from Chris Hunt to Allan Thomann's home, and after being referred to WITY Radio, to Allan Thomann's place of business, and a return phone call by Allan Thomann to Chris Hunt.

On August 24, 1988, Chris Hunt called WITY Radio and attempted to talk to Allan Thomann. Allan was at that time on the phone and Hunt just left a message. (Volume IV, P. 38) Allan returned Hunt's phone call approximately two minutes later. (Volume IV, P. 40). Hunt recorded most of this conversation, after the introductory phases. (Volume IV, P. 41) This tape recording was identified as People's #4B during the trial and played for the court. (Volume IV, P. 71-72)

After laying a chain of custody on the videotape, People's #2A, from Hunt's receipt to the courtroom , the videotape

was played while Dr. Philip Merk was on the stand.

The State's Attorney qualified Dr. Merk as an expert. (Volume VI, P. 338) Dr. Merk was presented to testify concerning the age of the persons shown in the videotape.

Dr. Merk testified that he makes a determination of age based primarily upon the Tanner Method of Dr. James Tanner of England. He explained the Tanner Method as basically a series of five stages where various physical findings on children change over time. Dr. Merk believes that he can determine the approximate age of a child from observing these physical findings. (Volume VI, P. 329-330)

However, the estimates under the Tanner scale are assumed to be in the absence of disease or other problems a person might have. (Volume VI, P. 331)

Dr. Merk then went on to identify certain persons in the still frames of the videotape, People's #2A, as being in various stages under the Tanner scales. (Volume VI, P. 350-357) However, Dr. Merk could **not** give an age range of any of the other youngsters in the tape except those that he specifically identified to the prosecutor. (Volume VI, P. 401-402). Dr. Merk, also, was not qualified to judge whether the scene in the photograph was truly showing what it appeared to show. (Volume VI, P. 365)

Indeed, Dr. Merk has no way of determining whether any kind of alteration by airbrushing or otherwise had been made to any of the frames that he was able to identify. (Volume VI, P. 367-371) If a person is capable of airbrushing over pubic hair, that would defeat Merk's ability to make an age determination from

a photograph. (Volume VI, P. 368)

The Defendant objected strenuously to the admission of People's #2A based, among other reasons, upon the lack of authentication and foundation for the videotape and the photographs in the videotape. (Volume VII, P. 426-439) The Defendant moved for a Directed Verdict at the close of the State's case, which was denied by the Trial Court. (Volume VII, P. 455)

The Defendant presented numerous witnesses to testify to his character and reputation in the community. Also, the Defendant testified in his own behalf.

At the time of trial Allan Thomann was 38 years old and engaged to Meredith Crook of Georgetown. (Volume VII, P. 455-456). He was living in his father's home and had a bedroom of his own at 206 Edwards, Danville, Illinois. He went to

the University of Illinois from 1968 to 1972. (Volume VII, P. 456) Allan received a Bachelor of Science in Communications, graduating with honors. (Volume VII, P. 457)

At the time of trial, he was the President of Vermilion Broadcasting Corporation which owns WITY Radio and was also the General Manager of the Station. He had been so employed for nearly eight (8) years. As General Manager, he was responsible for the overall operation of the Station and also had duties as General Sales Manager. (Volume VII, P. 458)

Allan had a videotape collection of approximately 50 tapes, including some eight to ten tapes dealing with sexual matters. (Volume VII, P. 459) Allan received People's #2A, the videotape in question, at least five, possibly six, years, before the trial. He had not

requested that particular tape, he had requested another tape and People's #2A came in a group of tapes, unsolicited by him. (Volume VII, P. 461)

Some days after receiving People's #2A, he reviewed just a portion of it and did not view the whole thing. He did not bother to rewind the tape after seeing only the beginning. (Volume VII, P. 462-464) Allan did not see the area of still photos nor did he know anything about the commercial film, The Elephant Man, being included on the end of the tape. (Volume VII, P. 466) Allan Thomann did not view the tape at any time after that first evening, partly because of the poor quality of the tape. (Volume VII, P. 467)

After additional testimony by Allan Thomann and his character witnesses, the Defendant rested. The State then presented rebuttal evidence to lay the foundation

for certain items seized pursuant to a Search Warrant that had been used to cross examine Allan Thomann. (Volume VIII, P. 695-705)

The Trial Court then found the Defendant, Allan Thomann, Guilty on only Count I, dissemination of a videotape showing sexual intercourse, Not Guilty on the other four Counts of the information. (Volume VIII, P. 705)

POST-TRIAL

On September 15, 1989, the Trial Court denied Defendant's Amended Motion for a New Trial.

The Sentencing Hearing in this case was heard on October 13, 1989. No issue concerning the sentence is raised in this Appeal.

At the Sentencing Hearing, the State's Attorney's Office, over objection of the Defendant, played portions of two

(2) additional videotapes seized from Allan Thomann's home. These videotapes were French Fantasies, and Cheerleaders-Behind IV. (Volume XI, P. 28-30). There was no allegation that these were illegal tapes. They were offered solely for the purpose of showing the content of the tapes. (Volume XI, P. 25-26) After hearing additional testimony from Allan Thomann and witnesses on his behalf, the Trial Court imposed sentence.

A Notice of Appeal was filed on October 19, 1989.

On May 1, 1990, the Fourth District Appellate Court denied Allan Thomann's appeal.

The petitioner specifically raised the constitutional issue of the foundation for the videotape in his briefs to the appellate court and in his Petition for Leave to Appeal to the Supreme Court of the State of Illinois.

REASONS FOR GRANTING

THE WRIT

THE DECISION BELOW PERMITS THE CONVICTION OF PERSONS IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, BY ALLOWING A CONVICTION OF CHILD PORNOGRAPHY BASED UPON A VIDEO TAPE WHICH HAS NOT BEEN SHOWN TO ACCURATELY PORTRAY A CHILD INVOLVED IN SEXUAL CONDUCT, AND THIS COURT SHOULD REVIEW THIS DECISION TO ESTABLISH THE FOUNDATIONAL REQUIREMENTS FOR THE ADMISSION OF ITEMS OF ALLEGED CHILD PORNOGRAPHY.

In New York v. Ferber, 458 U.S. 747, 763, 102 S. Ct. 3348, 73 L.Ed. 2d 1113 (1982), this Court identified a new category of unprotected expression under the First Amendment-child pornography. However, it was vital to the Court's decision that this not be a content related prohibition.

The interest is in the actual physical and psychological protection of children. If it is necessary for literary or artistic value, to portray children in sexual acts, this Court noted that a person over the statutory age, who perhaps looks younger could be utilized. The Supreme Court noted, "[n]or is there any question here of censoring a particular literary theme or portrayal of sexual activity." New York v. Ferber, 458 U.S. 747, 763, 102 Sup. Ct. 3348, 3357 (1982).

The decision below in this case does not restrict the State to prohibiting only this limited, prescribable activity. The State's evidence in this case never attempted to show that the videotape in dispute actually depicted children engaging in sexual conduct. There was no attempt to show that the videotape truly and accurately depicted what the State

alleged that it depicted. The only foundational testimony was a somewhat shaky chain of custody on the tape once it arrived in the hands of the State until the tape was played in the trial court.

The court below found this lack of no importance "[s]ince we are not concerned with the underlying incident or the scene that the tape portrays, it is not necessary for testimony to be presented that the tape fairly and accurately depicts the scene." Appellate Court Opinion 12. However, in order for the State to punish a person under New York v. Ferber, 458 U.S. 747, 102 Sup. Ct. 3348, 73 L.Ed. 2nd 1113 (1982), it is necessary that the videotape truly be of children under the age of 18, since this is the only reason that the State may prohibit the videotape without proving the contents of the tape are obscene. Therefore, the

court below is clearly wrong in finding the 'underlying incident or the scene that the tape portrays' unimportant. It is only the truth of the rendition of the underlying incident that allows the State to prohibit a particular item which is otherwise protected by the First Amendment.

In New York v. Ferber, this Court allowed the States greater leeway in regulating pornographic depictions of children than in regulating obscenity. There are four main reasons for allowing this greater control to the States.

1. The State's interest in safeguarding the well-being of a minor is compelling.

2. The distribution of these materials is intrinsically related to the sexual abuse of children.

3. The advertising and selling of

child pornography provides an economic motive for the production of such materials.

4. There is an exceedingly modest value in permitting these materials. New York v. Ferber, 458 U.S. 747,756-764, 102 Sup. Ct. 3348, 73 L.Ed. 2nd 1113 (1982).

As can be seen from reviewing these reasons, the primary justification for the greater control over child pornography is protecting children. Without this justification, there is no greater control allowed to the States. The decision of the court below in this case does not require that the persons involved in the pornography be children,and, without such a requirement, the greater regulation allowed under Ferber is not permissible. This foundational lack results in the State being allowed to control

communicative material without demonstrating either, the material obscene or that the participants are actually children.

The theory that the "pictures speak for themselves" is an inappropriate holdover from the analysis of obscenity prosecutions. In an obscenity prosecution, indeed, the "pictures speak for themselves", since the content of the picture is unprotected by the First Amendment without consideration of whether the activity depicted in the picture ever occurred. Indeed, words alone, without any pictures, may be prohibited if obscene. In the case of child pornography, however, only visual depictions of sexual conduct by children may be prohibited. New York v. Ferber, 458 U.S. 747,764, 102 Sup. Ct. 3348, 73 L.Ed. 2nd 1113 (1982).

And, visual depictions may only be prohibited if they actually involve persons under a specified age. As this Court noted, "..., if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized." New York v. Ferber, 458 U.S. 747,763, 102 Sup. Ct. 3348, 73 L.Ed. 2nd 1113 (1982). By allowing the pictures to speak for themselves, the court below abandons the obligation to make an independent examination to insure that a forbidden intrusion on the field of free expression does not occur.

Allowing the admission of a videotape without some showing that the tape truly and accurately depicts children engaged in sexual conduct does not sufficiently confine the perimeters of any unprotected category within acceptably narrow limits

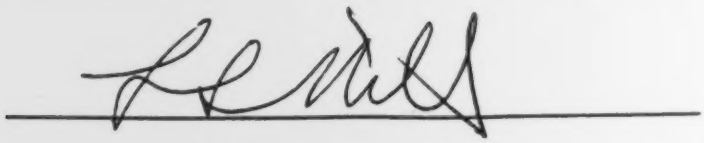
to ensure that protected expression will not be inhibited. Bose Corporation v. Consumers Union of United States, Inc., 466 U.S. 485, 505, 104 S.Ct. 1949, 80 L.Ed. 2d 502 (1983)

The dangers of allowing the pictures to speak for themselves is apparent in this case. The only evidence tendered by the State on the age of the persons in this case was through the expert testimony of Dr. Merk, who specifically denied the ability to determine whether the videotape truly depicted what it purported to show. (Volume VI, P. 365-368)

The First Amendment requires that a more certain foundation be established if the State is to be allowed to prohibit free expression. This Court should review the decision of the Fourth District Appellate Court of the State of Illinois.

CONCLUSION

Therefore, this Court should issue a Writ of Certiorari to review the decision of the courts of the State of Illinois.



Larry S. Mills

LAW OFFICES OF RICHARD J. DOYLE & ASSOCIATES
1022 N. Vermilion St.
Danville, IL 61832
217-446-3844

Attorney for Petitioner

APPENDIX

NO. 4-89-0824

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)
Plaintiff-Appellee,	) Appeal from) Circuit Court) County of) Vermilion
v.	) No. 88-CF-210
ALLAN M. THOMANN,	) Honorable) Thomas J Fahey
Defendant-Appellant.	) Judge Presiding

JUSTICE LUND delivered the opinion of the court:

On June 15, 1989, defendant Allan Thomann was found guilty, following a bench trial in the circuit court of Vermilion County, of committing the offense of child pornography in violation of section 11-20.1(2) of the Criminal Code of 1961 (Code). (Ill.Rev. Stat. 1987, ch. 38, par. 11-20.1(2).) He subsequently was

placed on probation. He now appeals, alleging numerous errors. We affirm.

On September 8, 1988, an information was filed alleging defendant committed five counts of child pornography. These counts were all based on the possession or dissemination on July 14, 1988, of a videotape portraying children under the age of 18 years involved in various sexual acts prohibited by the Code. (Ill. Rev. Stat. 1987, ch. 38, par. 11-20.1.) A bench trial commenced on June 12, 1989.

The evidence establishes that Indiana State Police investigator Chris Hunt had been working in the field of the sexual exploitation of children for several years. Part of his investigations involved placement of personal ads in various sexually explicit magazines. One such ad was placed in the magazine entitled, "Video Xcitement." The ad indicated a "swinging couple" was wanting to exchange

or purchase photos or video. It further indicated they were looking for "tapes on family interests, male or female, slender types, little or no body hair." It gave an alias and a post office box for interested parties responses.

In April 1988, defendant responded with a letter which indicated he had read the ad and had a tape which might be of interest. It described the tape as, "It is a copy of a tape shot by a father of his daughter and three of her friends (a girl and two boys)." Hunt did not get this from his post office box until July.

On July 11, 1988, Hunt answered by letter sent to defendant's post office box. On July 18, he received from the defendant another letter and the videotape in question. The letter explains that defendant tried to make a copy of the tape but was unhappy with the results so he sent the original and would like it back.

It also observed that the tape needed to be rewound to the beginning. Hunt again responded by letter and included some photographs which he took from a sexually explicit magazine. Defendant responded with another letter returning Hunt's own.

Defendant telephoned the number Hunt gave him and left a message on Hunt's answering machine. On August 24, 1988, Hunt, after getting a number from directory assistance, called defendant's home and spoke with his father. Hunt was directed to call defendant at his place of business and he did so, leaving a message. Defendant returned Hunt's call and Hunt taped the conversation.

In the conversation, defendant indicated he had the tape for several years. The following exchange occurred:

"[Hunt]: Boy, that's nice. That was in -- that tape's in awfully good shape and I tell you, those -- teenage girls, they -- they know how to get it on there.

[illegible]endant: [illegible] yeah, there's no question about it.

[Hunt]: And the -- Did you put -- Allan, I especially like those stills on the -- on the back of it.

Defendant: You know, I had forgotten those were on it. Again, I did not do that. I need to -- because you had mentioned it I need to take a look at that and see what that is, because I have forgotten. [Y]ou know, it's such a long segment that I'm never -- I don't know if I have

ever paid any attention to what was on that."

"[Hunt]: But let me do that, and I tell you what, I got to look through that tape one more time. I tell you, those teenage girls, they -- I just got to think it looks like they're what, about fourteen or fifteen years of age.

Defendant: Oh, yeah, yeah, probably, that's exactly it.

[Hunt]: Oh, they're nice. Look at that, and I like those stills at the end again.

Defendant: Okay."

On September 8, 1988, the present information was filed and a search warrant was authorized and executed upon defendant's home. Defendant, not wishing to upset his parents who lived with him, directed the police to his bedroom,

telling them that what they wanted was there. Found in the room was a briefcase containing numerous items, including two of the letters Hunt sent. Also recovered were three magazines, "6-16", "Nudist Children and Their Parents", and "Young with and without their parents, naked. These did not involve any sexual activity. The police found in an envelope several pictorial advertisements with order forms for various graphic sexual matters, including "Lolita" magazines, which depict children in sexual activities.

The videotape sent to Hunt was approximately two hours long and was played for the court. It appeared to be a homemade video. The first portion involved a film of a sexual nature. It was followed by several still photographs depicting children in various sexual poses. After several minutes of "snow", the end of the

movie "Elephant Man" came on. Apparently the make of the video used a tape of that movie to record on.

Dr. Phillip Merk observed the tape as it was played. He is a board-certified pediatrician who teaches at Indiana University and works part-time with the sexual abuse clinic involving sexually abused children. He also teaches seminars concerning such children throughout the State. He explained it is possible to tell the age range of children using the Tanner method, based on development of the genitalia, the presence of public hair, and the development of the female's breasts. After viewing the tape, he rendered an opinion concerning the ages of the various participants in the still photos, which placed most of them in the range of 8 years to 14 years. He was unable to make any age determination on

the participants in the action film portion of the tape.

Defendant explained in his testimony that he has a collection of over 50 videotapes on a wide variety of subjects. Some of these, 8 to 10 in number, are of a sexually explicit, adult nature. He received the tape in question approximately five years earlier. It came with some other tapes which he had requested. This one was unsolicited. When he first received the tape he viewed it, but he only viewed about the first 15 or 20 minutes of it. After that, he put it away and never looked at it again. He explained this is the reason the tape needed to be rewound by Hunt. He never saw the portion containing the still photos.

He stated that the taped conversation with Hunt took place around 5 p.m. on a workday. He explained that he owns and operates a radio station and that the

office is very hectic around that time. He maintains he was distracted during much of the call and was not paying attention. He was simply being agreeable with Hunt, and this is why he agreed with some of Hunt's statements.

He also explained that the Lolita advertisements were totally unsolicited and he had received those several years prior. At first he threw them in the garbage but, upon consideration, he became concerned his parents would see them. He returned the ads to his briefcase and forgot about them. He explained he never tried to copy the tape and he placed that language in his letter as a means of salesmanship. Defendant then presented the testimony of numerous witnesses as to his character and community involvement.

The court found defendant guilty of one count and not guilty of four others. He subsequently placed defendant on 18

months probation and fined him $7,500. Defendant now appeals, alleging (1) the search warrant was defective for failing to establish probable cause to search defendant's home; (2) the search warrant was defective for failing to particularly describe the items to be seized; (3) the videotape was improperly introduced into evidence; and (4) defendant was not proved guilty beyond a reasonable doubt.

Defendant initially argues the search warrant executed on his residence was invalid and the court erred by denying his motion to suppress the evidence seized pursuant to the search. He specifically argues that there was no probable cause to search his residence, and that the warrant fails to properly describe the items to be seized.

On September 8, 1988, the State procured an arrest warrant for defendant for the instant offense and, at the same

time, sought the search warrant in question. Investigator Hunt gave oral testimony for the basis of the search warrant. This testimony was substantially similar to his trial testimony. It included the exchange of letters, phone conversations, and a brief description of the videotape.

Defendant observes that before a search warrant may be issued, a showing must be made that the facts and circumstances are sufficient to warrant a reasonable person to believe that an offense has occurred and that evidence thereof is at the place to be searched. (People v. Stewart (1984), 104 Ill. 2d 463, 476, 473 N.E.2d 1227, 1232.) He argues that Hunt's testimony fails to establish any connection between his residence and the criminal offense. He observes Hunt testified that he always dealt with defendant through a post office

box number or on the telephone at the radio station. Defendant maintains that the search warrant is therefore defective for authorizing a search of his residence, and the court should have granted the motion to suppress.

Our supreme court has observed that in reviewing the sufficiency of a search warrant complaint it is only the probability , and not a prima facie showing, of criminal activity which is the standard of probable cause. (Stewart, 104 Ill. 2d at 475, 473 N.E.2d at 1232, quoting People v. Gacy (1984), 103 Ill. 2d 1, 21, 468 N.E.2d 1171, 1177.) The affidavits or evidence presented in support of a search warrant must be tested and interpreted in a commonsense and realistic manner. (People v. Parker (1968), 42 Ill. 2d 42, 45, 245 N.E.2d 487, 489; Stewart, 104 Ill. 2d at 475-76, 473 N.E.2d at 1232, quoting Gacy, 103 Ill. 2d

at 21, 468 N.E.2d at 1177.) The courts, in deciding the question or probable cause, are not disposed to be deciding the question or probable cause, are not disposed to be unduly technical but, rather, the probabilities considered are the factual and practical considerations of everyday life on which reasonable men, not legal technicians, act. (People v. Free (1983), 94 Ill. 2d 378, 400, 447 N.E.2d 218, 228.) The determination of probable cause by the issuing court should be paid great deference by the reviewing court. Stewart, 104 Ill. 2d at 476, 473 N.E.2d at 1232, quoting Gacy, 103 Ill. 2d at 21, 468 N.E.2d at 1177.

Here, the evidence presented the court establishes that defendant mailed a videotape involving child pornography to Hunt. Defendant's letters described some of the activity on the tape and indicated that this is a "loaner," which he wanted

back. Defendant also indicated he and his wife were voyeurs, and that he wanted to know if Hunt had similar material. This would indicate to a reasonable person that defendant was interested in watching such material. While Hunt only mailed items to a post office box number, it is apparent that defendant would not be able to store his items there. An application of common sense would lead a reasonable person to the conclusion that since defendant has indicated he and his wife are voyeurs, and since such property cannot be stored in a post office box, it is most probable that similar property is kept at his residence where viewing would most likely take place. Although it may not be easy to determine the existence of probable cause in any given case, the resolution of doubtful or marginal cases in this area should largely be determined by the preference to be accorded warrants.

(Stewart, 104 Ill. 2d at 477, 473 N.E.2d at 1233.) In reviewing the evidence in a commonsense and realistic fashion, we believe it is sufficient to justify issuance of the warrant for defendant's residence.

Further, accepting defendant's argument that probable cause was lacking, we find the good-faith exception to the exclusionary rule to be applicable. In United States v. Leon (1984), 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405, the Court modified the exclusionary rule to allow the State to use evidence obtained by officers acting in good faith and in reasonable reliance on a search warrant issued by a detached and neutral magistrate, but ultimately found to be unsupported by probable cause. This exception was adopted and applied by our supreme court in Stewart (104 Ill. 2d at 477, 473 N.E.2d at 1233).

Defendant argues the exception should not apply because the warrant is facially deficient and Hunt misled the court by withholding some information and supplying other misleading information. (See People v. Bohan (1987), 158 Ill. App. 3d 811, 818, 511 N.E.2d 1384, 1389.) However, a review of the warrant establishes that it is not so facially deficient that the executing officers cannot reasonably presume it to be valid. (Bohan, 158 Ill. App. 3d at 819, 511 N.E.2d at 1389.) We also observe that a mechanism has been created pursuant to ranks v. Delaware (1978), 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674, to provide a hearing to protect a defendant against perjurious warrant applications. (People v. Lucente (1987), 116 Ill. 2d 133, 150, 506 N.E.2d 1269, 1276.) However, our review of Hunt's probable-cause testimony, in view of his trial testimony, fails to convince us that

he misled the court with information he knew was false or, but for his reckless disregard for the truth, should have known was false. See Bohan, 158 Ill. App. 3d at 818, 511 N.E.2d at 1389.

Defendant also maintains the warrant is defective because it does not sufficiently describe with particularity the items to be seized. Defendant raised a number of objections to the search warrant at the trial level, but this was not one of them. Nor was this allegation included in defendant's post-trial motion. Accordingly, this issue is properly considered waived. People v. Enoch (1988) 122 Ill. 2d 176, 186-87, 522 N.E.2d 1124, 1129-30, cert. denied (1988). U.S. 102 L. Ed. 2d 263, 109 S. Ct. 274.

A trial court's determination on a motion to suppress will not be disturbed unless it is manifestly erroneous. (Free, 94 Ill. 2d at 401, 447 N.E.2d at 229.) We

find no such difficulty in this case with the trial court's denial of defendant's motion.

Defendant next contends the videotape was improperly admitted into evidence due to a lack of foundation. There is no dispute that the videotape is the one defendant mailed Hunt. Defendant observes that a sufficient foundation for the introduction of a photograph or videotape is made by testimony of any person with personal knowledge of the object of the photograph or tapes at a time relevant to the issues, that the photograph or tapes at a time relevant to the issues, that the photograph or tape is a fair and accurate representation of the object at that time. (People v. Hebel (1988), 174 Ill. App. 3d 1, 27, 527, N.E.2d 1367, 1384, cert. denied (1989), U.S. 103 L. Ed. 2d 848, 109 S. Ct. 1544.) He further observes that there is no testimony that the videotape

in this case truly and accurately depicts what it purports to depict. Accordingly, he insists the foundation is improper and the tape should not have been introduced into evidence. We disagree.

We have no disagreement with defendant's general proposition of law. It is his application of this principle with the facts of the present case with which we disagree. As the trial court so astutely put it, defendant is arguing apples and oranges.

The authority defendant relies upon addresses the circumstance where the pictures are used as demonstrative evidence of a scene or object (M. Graham, Cleary & Graham's Handbook of Illinois Evidence Section 401.8, at 125 (4th ed. 1984)) or, more recently, as substantive evidence of a crime (Hebel, 174 Ill. App. 3d at 28-29, 527 N.E.2d at 1384-85). Under each circumstance, the pictures are

portraying a scene or incident for the court. Accordingly, it is necessary that the evidence establish they accurately portray this incident or scene.

However, in the present case, defendant is convicted of disseminating a videotape which portrayed children involved in sexual acts. Thus, it is the videotape itself which is the critical piece of evidence. The tape is not relevant as demonstrative evidence of the incident as it was actually filmed or as substantive evidence of any criminal offense that occurred at that time. The dissemination of the videotape itself is the criminal offense. Since we are not concerned with the underlying incident or the scene that the tape portrays, it is not necessary for testimony to be presented that the tape fairly and accurately depicts the scene.

Defendant insists that to lay a proper foundation the State must show that the videotape accurately portrays persons under the age of 18. He maintains the failure to do so would "allow persons to be convicted of child pornography, not when they possess or disseminate a photograph or videotape of someone who is under 18 but merely when they look to be under 18." However, defendant is confusing the evidence necessary for the foundation of the tape with that necessary for a conviction.

In People v. Schubert (1985), 136 Ill. App.3d 348, 483 N.E.2d 600, the defendant was convicted under a predecessor of the current child pornography statute for possessing photographs. He maintained the State must present independent evidence of the children's ages to support the conviction. The court disagreed, observing the

pictures speak for themselves. (Schubert, 136 Ill. App. 3d at 354, 483 N.E.2d at 605.) The Court explained:

> "Congressional investigations indicate that Chicago is a major center for producing and disseminating child pornography. However, it is often impossible to determine the source of the child pornography. It is quite common for photographs made in the United States to be sent to foreign countries to be reproduced and then returned to this country to give the impression of foreign origin. [Citation.] The identity of children depicted and their whereabouts are frequently unknown. Requiring law enforcement officials to track

> down and identify the depicted children to successfully prosecute a child pornography case would destroy the effectiveness of the child pornography statute in preventing the sexual exploitation of children. Therefore, the legislature has vested the trier of fact with the function of determining the age of the child depicted." Schubert, 136 Ill. App.3d at 353, 483 N.E.2d at 604-05.

This, it is clear that the determination of the age of the participants is to be made by the trier of fact during the proceeding as a necessary element of the offense. This determination is not a part of the necessary foundation for the introduction of the tape. All the State must show as a foundation is that

the tape introduced into evidence is the tape Hunt received from the defendant and that this tape has not been altered in any fashion since then. As noted, there is no dispute that this was done. Accordingly, there is no doubt that it was properly introduced into evidence.

Finally, defendant maintains he was not proved guilty beyond a reasonable doubt. He believes the evidence fails to establish the participants are under 18 years of age and that he had knowledge the still photographs which Dr. Merk identified as involving underage children were on the tape.

A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. (People v. Vriner (1978), 74 Ill. 2d 329, 342, 384 N.E.2d 671, 676.) When presented with a challenge to the sufficiency of the

evidence, it is not the function of this court to retry the defendant. (People v. Collins (1985), 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277.) Once the defendant has been found guilty of the charged crime, the fact finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. (Jackson v. Virginia (1979), 433 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2789; Collins, 106 Ill. 2d at 261, 478 N.E.2d at 277.) The relevant question is whether, if after viewing the evidence in such a fashion, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson, 443 U.S. at 319, 61 L. Ed. 2d at 573, 99 S. Ct. at 2789; Collins, 106 Ill. 2d at 261, 478 N.E.2d at 277.

The sole testimony concerning the age

of the participants was the testimony of Dr. Merk. Defendant believes this testimony is impeached by the possibility that the photos were airbrushed or that the participants have a hormonal problem. However, there is no evidence of either of these occurring. While these are possibilities, their likelihood goes to the weight of Dr. Merk's testimony. The court had the opportunity to observe the tape and listen to the testimony. In fact, a court does not need expert testimony to determine whether the participants are underage, but can rely on its own everyday observations and common experiences in making this determination. (Schubert, 136 Ill. App. 3d at 354, 483 N.E.2d at 605.) Accordingly, we can find no error with the court's finding.

Similarly, we have no difficulty with the court's determination concerning defendant's knowledge. The length of

possession of the tape, the ad to which defendant responded, the letters, the phone conversation, and everyday experiences and observations support this conclusion. Admittedly, defendant testified to the contrary and offered explanations for various facts. However, some of these explanations are less than compelling. Further, a trial court is not required to accept a defendant's testimony. In a bench trial, it is the function of the court to determine the credibility of witnesses and the weight that should be given to their testimony. (People v. Molstad (1984), 101 Ill. 2d 128, 133, 461 N.E.2d 398, 401.) It is not for our court to substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses. (People v. Manion (1977), 67 Ill. 2d 564, 578, 367 N.E.2d 1313, 1320.) Considering all the

evidence in the light most favorable to the prosecution, we find the evidence sufficient to sustain the conviction.

Affirmed.

GREEN and McCULLOUGH, JJ., concur.